

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 490 – Award No. 490 – Gil
Carrier File No. 14-15-0320
Organization File No. 110-SF13N1-15102.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 8, 2015 when Claimant, Gerald A. Gil, Jr. (0052852), was dismissed for violations that resulted in fouling Main track without authority on Main 1 at Milepost 800.5 on the Clovis Subdivision on June 11, 2015 and failure to determine if the proper on-track safety was provided, failure to conduct a proper job safety briefing including track limits of authority, failure to properly restate limits received from train dispatcher DS07, failure to notify the train dispatcher of the correct track initially occupied or fouled, and failure to remain alert and attentive in the performance of duty. The Carrier alleged violation of Maintenance of Way Operating Rule (MWOR) 11.3 Fouling the Track, MWOR 11.4 Job Briefings, MWOR 6.3.1 Main Track Authorization, MWOR 6.11 Mandatory Directive and 1.1 Safety.

2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this dismissal and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing July 8, 2015, continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, John M. Gil, had been employed by the Carrier since 2011. On June 12, 2015, the Carrier notified Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged violations that resulted in fouling Main track without authority on the Southwest Division, Clovis subdivision, on Main 1 at MP 800.5 on June 11, 2015 at approximately 0823 hours MDT while working on System Construction Gangs CG04 and/or CG02. Alleged violations include but not limited to, failure to determine if the proper on-track safety was provided, failure to conduct a proper job safety briefing including track limits of authority, failure to properly restate limits received from train dispatcher DS07, failure to notify the train dispatcher of the correct track initially occupied or fouled, failure to properly void released mandatory directives, and failure to remain alert and attentive in the performance of duty. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged and dismissed him from service.

The facts of this case are not in dispute. On the day at issue, Claimant was the Foreman of a Surfacing Gang. Roadmaster Chad Demore testified at the investigation that he received notice that Claimant's gang had been reported out of its limits. He traveled to the scene, where Claimant told him he had asked for authority on Main 1, but the dispatcher gave him Main 2, and that both regulators and the tamper had fouled the track. He added that Claimant had been working with him about a month.

Mr. Demore explained that Claimant's gang needed to perform their work between Carnero and West Tejon, on Main 2. To get there, they entered Main 1 and Milepost 800.5 and needed to cross over to the work location at Milepost 798, off Main 2. Claimant was required to obtain track and time authority for that section of track. In this case, Claimant obtained authority from the dispatcher, and, according to the applicable Carrier Rule, he was required to write it down, repeat it to the dispatcher, and have the dispatcher tell him it was correct. The dispatcher repeated Claimant's requested authority incorrectly, and he confirmed that the incorrect authority was in fact correct.

Mr. Demore also explained that employees are required to have a job briefing before fouling track, so that they know and understand the authority they will be working under. He stated that, based upon his interviews with the employees, no adequate safety briefing was conducted.

Mr. Demore acknowledged that on June 8, 2015 the Carrier issued a general order advising of changes on the track chart for the area in which Claimant was working. He explained that the order revises the timetable. He reminded employees, in a job briefing, that it had issued, but did not go over it in detail.

Division Engineer Samuel Casey Turnbull also traveled to the site. He testified at the investigation that Claimant also told him that he had requested track and time between Carnero and Negra, Main 1, but the dispatcher gave him Main 2 instead and he did not catch the mistake. Mr. Turnbull added that Claimant was confused about the authority, and questioned a Welder over the radio, but that was as far as it went.

Mr. Turnbull also interviewed several of the involved employees, who stated that Machine Operator Taylor Norman had, over the radio, questioned the authority, but another Machine Operator, Shawn Tong, told him to get into his machine and move. Mr. Turnbull also determined that there had not been a proper briefing after Claimant obtained the authority, necessary to ensure the employees understood it, and the mistake might have been caught in that setting. Several employees gave written statements which were included in the hearing record.

Claimant admitted at the investigation that he had not obtained the proper authority, which caused his group to be out of its limits. He stated that the dispatcher gave him different authority than he had requested, and he responded that it was correct, not noticing the mistake. He also did not have another employee verify that the authority was correct, as required by the Rules. He acknowledged that he lined the switch for the group to come onto Main 1, between Carnero and Negra, but he did not have authority to occupy that track.

When asked whether he had conducted a job briefing, Claimant stated that he was in his truck with another employee, and they looked at the track chart. Two other employees were standing next to him, and they copied the track and time as he did, from the dispatcher. Another employee was relayed the information by radio.

Regulator Operator Taylor Norman testified at the investigation that he was part of Claimant's work group on the day at issue. He stated that Claimant gave him the authority, but he raised a flag that the authority was not correct.

Claimant's personal record shows a Level S record suspension, with a three-year review period, issued on May 11, 2015 for failure to properly protect himself and his work group, and a violation in 2014 for threatening and improper conduct.

The Carrier states that Claimant's violations are clear. The Carrier notes that on June 11, 2015, Claimant was the Foreman on a surfacing gang operating out of Vaughn, New Mexico, and he was in charge of obtaining authority for his team to move from the spur track to Main 1, and then from Main 1 to Main 2 to complete work between Carnero and West Tejon at Milepost 798.

It is undisputed, the Carrier adds, that when Claimant requested authority from Carnero to Negra on Main 1, the dispatcher responded with different authority. Claimant, the Carrier points out, confirmed the incorrect limits. The Carrier stresses that Claimant admits he did not obtain the proper authority. In addition, the Carrier states, Claimant did not have another employee verify the authority, as required by Carrier Rules and, despite confusion expressed by employees and Claimant himself, did not stop the crew from proceeding, causing them to get outside their limits. The Carrier also points to Roadmaster Demore's testimony that Claimant did not conduct a job briefing before allowing employees to work on the track.

Claimant's admissions, the Carrier argues, are sufficient to satisfy its burden of proof. As for the penalty, Claimant committed a serious violation which put himself and other employees in a potentially fatal situation. The Carrier notes that Claimant committed a similar violation just two months before this one. According to the Carrier's Policy for Performance Accountability (PEPA), the Carrier states, Claimant was subject to dismissal for that violation, as it was his second Level S offense within three years, but the Carrier showed leniency. This is Claimant's third Level S offense within three years, and all involved safety violations. The Carrier urges that dismissal was not an excessive or arbitrary penalty.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. In particular, the Organization argues, the area where the incident occurred had just been renamed on the timetable and track chart. The Organization points out that the Carrier's witnesses allege that the matter was covered in a general order issued three days before the incident, but there was no job briefing or training on the matter. In addition, the Organization states, the record reveals a great deal of confusion regarding the requirements for limits to be verified by other employees. Claimant, the Organization states, obtained what he believed were proper limits, and they were verified, by an employee who did not appear at the investigation but did provide a written statement.

The Organization also points out that on the day at issue Claimant was responsible for securing five different authorities covering six different entries on his track and time book. The Organization notes that he was dealing with multiple crossovers, control points, east and westbound signals, multiple work groups and numerous employees trying to get on the radio. In addition, the Organization states, Claimant was very harried about getting authority so his gang could begin work, and the testimony points to the faults of the Assistant Foreman, who was very dismissive about questions concerning the authority and told the operators to shut up and move their machines.

Claimant, the Organization argues, was put in a nearly impossible situation. Dismissal for any Rules violation he may have committed is extreme, unwarranted and unjustified.

We have carefully reviewed the record in its entirety. First, we find no procedural error which deprived Claimant of his right to a fair and impartial investigation, especially as the facts are not in dispute. Claimant admitted that he did not notice that the dispatcher had provided him incorrect authority, and confirmed what the dispatcher gave him as correct. It does not appear that he had another employee specifically confirm the authority, as required by the Carrier's Rules. His supposed job briefing appears to have been, at best, a somewhat haphazard affair. As a result, Claimant sent the employees to work on the track within the limits he had requested, not the authority the dispatcher granted, which caused them to exceed the limits.

It is apparent that Claimant and the employees on his gang did not do all they could to ensure their safety on the track. While the Organization offers various excuses for Claimant's conduct, the safety concerns are just too critical for an employee to make these kinds of mistakes. He not only made the basic mistake of not noticing that the dispatcher read back a different authority, he failed to employ any of the safeguards that are in place to detect just such an error, and prevent the very situation that occurred here. There is no question as to Claimant's guilt, and, given that Claimant committed a similar offense shortly before this one, we cannot say that the Carrier's determination that dismissal was warranted represents an unfair, arbitrary or excessive exercise of its discretion to determine penalties.

AWARD

Claim denied.


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DAN NIELSEN
Neutral Member


A handwritten signature in blue ink, appearing to read "Michelle D. McBride", is written over a horizontal line.
MICHELLE McBRIDE
Carrier Member
A handwritten signature in blue ink, appearing to read "David Scoville", is written over a horizontal line.
DAVID SCOVILLE
Organization Member

Dated this 21 day of August, 2017.